

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Reexamination of Roaming Obligations of
Commercial Mobile Radio Service Providers

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WT Docket No. 05-265

To: The Commission

**REPLY COMMENTS OF MTA WIRELESS, INC.
ON FURTHER NOTICE OF PROPOSED RULEMAKING**

MTA WIRELESS, INC.

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO EXTEND AUTOMATIC ROAMING REQUIREMENTS TO NON- INTERCONNECTED BROADBAND INTERNET ACCESS SERVICES	2
A. Automatic Roaming is a Title II Common Carrier Responsibility.....	2
B. Alternatively, the Commission Can Use Its Ancillary Authority Under Title I to Enforce Compliance with Automatic Roaming Requirements for Non-Interconnected Information Services.....	6
II. APPLICATION OF AUTOMATIC ROAMING OBLIGATIONS TO BROADBAND INTERNET ACCESS SERVICES WILL NOT REDUCE INCENTIVE TO DEPLOY INFRASTRUCTURE	9
III. THE COMMISSION SHOULD GRANT THE PETITIONS FOR RECONSIDERATION OF THE “HOME MARKET” EXCEPTION	10
CONCLUSION	12

SUMMARY

Contrary to the views of Sprint Nextel and Verizon Wireless, the Commission has authority under the Communications Act to impose an automatic roaming requirement on CMRS providers applicable to broadband Internet access data services. Under Article II of the Act, the provision of automatic roaming is a common carrier obligation subject to regulation. The Commission's jurisdiction is also established under Article I of the Act, because the Commission's authority to impose roaming requirements for non-interconnected data services is "reasonably ancillary" to its statutory authority to regulate CMRS operators under Sections 201(a) and 332(c)(1)(B) of the Act and to promote accessibility to "advanced services" for consumers nationally. This authority is particularly clear when applied for the benefit of rural CMRS carriers seeking roaming rights.

Enlargement of the common carrier responsibility to provide roaming rights for broadband Internet access will help ensure the survival of smaller, particularly rural, carriers such as MTA Wireless who would otherwise be seriously hampered in their ability to compete for customers in today's market. The grant of such rights will bolster smaller CMRS carriers' incentive to invest in their own networks, thereby strengthening their competitive role for the benefit of consumers.

For this reason also, MTA Wireless supports the petitions for reconsideration in this docket of the Commission's "home market" exception to the automatic roaming requirement. For this purpose, the "home market" of carriers requesting automatic roaming should be defined as restricted to areas in which the carriers actually provide competitive services using their own spectrum and facilities. Application of the home

market exception in its current manifestation would, for MTA Wireless' purposes, nullify and render meaningless the requirement for automatic roaming rights in that it would effectively preclude MTA Wireless' access to such roaming rights throughout the Alaska market.

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In these reply comments, MTA Wireless, Inc. ("MTA Wireless") responds to the claims of Sprint Nextel¹ and Verizon Wireless² that the Commission lacks legal authority to extend the responsibility of CMRS carriers to provide automatic roaming rights on reasonable terms and conditions enabling access to non-interconnected broadband Internet services. As will be discussed below, the Commission has ample authority under both Title II and Title I of the Communications Act of 1934, as amended (the "Act"), to impose such a requirement on licensed CMRS operators. MTA Wireless also uses this opportunity to voice its support for the several petitions for reconsideration in this proceeding³ requesting that the Commission rescind or materially amend its broad determination that automatic roaming requirements are inapplicable in any area in which the requesting carrier holds a wireless license or leases spectrum, even if such requesting carrier cannot reasonably be expected to make use of its licensed or leased spectrum.

¹ Sprint Nextel Corporation Comments, filed October 29, 2007.

² Comments of Verizon Wireless, filed October 29, 2007, at 2-7,

³ Petition for Reconsideration of Leap Wireless International, Inc., filed September 28, 2007; Petition for Partial Reconsideration of T-Mobile USA, Inc., filed October 1, 2007; Petition for Reconsideration of MetroPCS Communications, Inc., filed October 1, 2007; Petition for Reconsideration of SpectrumCo LLC, filed October 1, 2007.

I. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO EXTEND AUTOMATIC ROAMING REQUIREMENTS TO NON-INTERCONNECTED BROADBAND INTERNET ACCESS SERVICES

Sprint Nextel and Verizon Wireless rely on the Commission's recent determination in the *Wireless Broadband Internet Access Order*⁴ that wireless broadband Internet access is an information service for the proposition that the Commission lacks legal authority to require automatic roaming access to such service for requesting carriers. In issuing that order, however, the Commission was establishing a "minimal regulatory environment" for wireless broadband providers consistent with the framework it had established for cable modem, wireline broadband and broadband over power line-enabled Internet access designed to promote its "goal of ubiquitous availability of broadband to all Americans."⁵ The Commission was not intending to prejudge the scope of wireless carriers' regulatory responsibility to provide automatic roaming rights to other carriers upon reasonable request and, in fact, had not yet issued its *Report and Order* in this proceeding. Contrary to Sprint Nextel's and Verizon Wireless' assertions, the Commission can legitimately select from more than one basis of legal authority to enlarge on the scope of the common carrier responsibility to provide automatic roaming it has found to exist in the *Report and Order* in this docket.

A. Automatic Roaming is a Title II Common Carrier Responsibility

In its *Report and Order* in this docket,⁶ the Commission clarified that automatic roaming is a common carrier service "subject to the protections outlined in Sections 201

⁴ *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, FCC 07-30, released March 23, 2007.

⁵ *Id.*, ¶ 2.

⁶ *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-143, released August 16, 2007, ¶ 23.

and 202 of the Communications Act.” It held, “If a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), it is desirable and serves the public interest for that CMRS carrier to provide automatic roaming service on reasonable and non-discriminatory terms and conditions.” The common carrier obligation identified, therefore, runs to a requesting wireless carrier, not to that carrier’s end users.

This fact is significant to the relevance of the *Wireless Broadband Internet Access Order* in this proceeding because the Commission acknowledged in that order that wireless broadband Internet access service includes a transmission component that is classified as telecommunications.⁷ The Commission went on to hold that this transmission component is a telecommunications service when offered on a common carrier basis and may also be considered CMRS.⁸ It is only this transmission component that is required by the requesting carrier for the purpose of roaming arrangements. The host carrier does not change the form or content of the information sent to or received by the roaming user; nor does the host carrier provide additional services or functionalities in permitting roaming on its network.

The Wireless Bureau of the Commission has also established that telecommunications offered wholesale by one carrier to another on a common carrier basis qualifies as a telecommunications service.⁹ Consistent with these decisions, the wholesale offering of automatic data roaming which is the subject of this proceeding

⁷ *Wireless Broadband Internet Access Order*, ¶ 29.

⁸ *Id.*, ¶¶ 32-33.

⁹ Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, *Memorandum Opinion and Order*, 22 FCC Rcd 3513 (2007) (hereinafter, “*Time Warner Declaratory Order*”), at 3517-18.

qualifies as a telecommunications service within the ambit of Title II of the Act. As further discussed in the *Time Warner Declaratory Order*, the classification of any *retail* service provided by means of the wholesale automatic roaming service – whether as an “information service” or a “telecommunications service” – has no bearing on the classification of the underlying wholesale transmission service.¹⁰ In summary, since the provision of automatic roaming services is a form of wholesale telecommunications service provided by one wireless operator to another, the classification of wireless broadband Internet access as an information service is not relevant to, and should not govern, the host carrier’s common carrier roaming obligations. It is not the provision of access to the Internet that determines the nature of the host carrier’s regulatory responsibility, but instead its provision of roaming services to requesting carriers.¹¹

Even if the Commission concludes that the information services determination in the *Wireless Broadband Internet Access Order* is germane to the present proceeding, it bears recalling that, in its earlier order, the Commission was careful to admonish that a CMRS operator’s provision of such information service would remain subject to other statutory requirements applicable to telecommunications services. For example, access to wireless broadband Internet services by persons with disabilities will continue to be enforced pursuant to Section 255 of the Act.¹² Where a wireless service provider uses the same pole attachments to provide both telecommunications and wireless broadband Internet access services, Section 224 of the Act will continue to apply to the commingled services.¹³ Similarly, local zoning authority over such commingled services will continue

¹⁰ *Id.*, at 3520-21.

¹¹ *Compare* Sprint Nextel Comments, at 7.

¹² *Wireless Broadband Internet Access Order*, ¶ 58.

¹³ *Id.*, ¶¶ 60-62.

to be enforced in accordance with Section 332(c)(7) of the Act.¹⁴ A carrier providing both CMRS telecommunications and wireless broadband Internet access services will also continue to have the same rights and responsibilities regarding interconnection obligations under Section 251 of the Act.¹⁵ Finally, all consumer protection requirements adopted by the Commission for telecommunications service providers will continue to apply to wireless broadband Internet access services.¹⁶

In other words, the classification of a portion of a CMRS carrier's service offering as information services will not preempt such carrier's obligation to comply with statutory requirements applicable to the entire range of its service offerings, which remain primarily telecommunications in nature. The Commission adopted the automatic roaming requirement in the *Report and Order* as a common carrier obligation pursuant to Section 332(c)(1)(B) in particular to benefit mobile telephony subscribers "by promoting seamless CMRS service around the country, and reducing inconsistent coverage and service qualities."¹⁷ Given this important consumer protection objective, the Commission will be well within its rights, and fully consistent with the holdings and spirit of the *Wireless Broadband Internet Access Order*, to require CMRS operators to comply with their automatic roaming obligations, even if it is determined that they are providing a combination of telecommunications and information services.

¹⁴ *Id.*, ¶¶ 63-65.

¹⁵ *Id.*, ¶ 66.

¹⁶ *Id.*, ¶ 69.

¹⁷ *Report and Order* ¶ 27.

B. Alternatively, the Commission Can Use Its Ancillary Authority Under Title I to Enforce Compliance with Automatic Roaming Requirements for Non-Interconnected Information Services

Even assuming, *arguendo*, that Title II does not provide the Commission sufficient authority, which MTA Wireless does not concede, there is well established authority for the Commission nevertheless to take action to require the provision of automatic roaming for non-interconnected data, as well as interconnected voice, services pursuant to its ancillary authority under Title I of the Act. The Supreme Court has recognized that this statutory authority allows the Commission to impose regulatory obligations, including certain common carrier obligations, on the provision of service regardless of whether that service is classified as a telecommunications or an information service.¹⁸

In a recent ruling, the Commission utilized its authority under Title I of the Act to establish a regulatory framework of disability access requirements applicable to interconnected VoIP providers and related equipment manufacturers. The Commission held that, regardless of whether the interconnected VoIP services are ultimately determined to be information, rather than telecommunications services (which it did not at that time decide), Title I provides it with authority to assume regulatory jurisdiction over the service.¹⁹ The Commission affirmed that it may employ “ancillary jurisdiction” when Title I of the Act gives it subject matter jurisdiction over the service to be regulated and the assertion of jurisdiction is “reasonably ancillary to the effective performance of [its] various responsibilities.”²⁰

¹⁸ See *National Cable Telecomms. Ass’n v. Brand X*, 545 U.S. 967, 996 (2005).

¹⁹ *In the Matter of IP-Enabled Services*, Report and Order, FCC 07-110, released June 15, 2007, ¶ 21.

²⁰ *Id.*, ¶ 22.

Subject matter jurisdiction plainly exists for the Commission with regard to the roaming obligations of CMRS operators. The Commission's general jurisdictional grant is set forth in Sections 1 and 2 of the Act, which establish the Commission's authority and responsibility to make available "to all the people of the United States...a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges...."²¹ Section 7(a) of the Act establishes "the policy of the United States to encourage the provision of new technologies and services to the public."²² These statutory provisions leave no question that the Commission has subject matter jurisdiction over end users' access to roaming rights and the terms under which such rights must be made available between carriers.

The Commission has held in the *Report and Order* in this proceeding, "Given the current CMRS market situation and wireless customer expectations, we find it is in the public interest to facilitate reasonable roaming requirements by carriers on behalf of wireless customers, particularly in rural areas."²³ The adoption of measures that will make roaming available on just and reasonable terms for all mobile wireless services, regardless of whether they are interconnected or not, or whether they are for voice or data services, is clearly "reasonably ancillary" to the Commission's statutory responsibilities under the Act to promote advanced services throughout the country. This is most clearly the case in rural areas of the country, given the Act's mandate that consumers in rural areas of the country should have access to telecommunications, information and

²¹ 47 U.S.C. §§ 151-152.

²² 47 U.S.C. § 157(a).

²³ *Report and Order*, ¶ 28.

advanced services of a nature and at rates “reasonably comparable” to those available in urban areas.²⁴

In their jointly filed comments, the Rural Telecommunications Group (“RTG”) and OPASTCO explain that rural customers rely more heavily on roaming privileges than do customers in more densely populated, metropolitan areas because the home coverage areas of rural wireless operators are smaller and more restrictive.²⁵ MTA Wireless knows this to be true from its first-hand experience in competing with larger wireless operators. It is further noted in this regard that, in the *Wireless Broadband Internet Access Order*, the Commission specifically cited its Title I ancillary jurisdiction as a basis to ensure that consumer protection obligations are enforced in the provision by CMRS operators of wireless broadband Internet access services that are classified as information services.²⁶

Contrary to Verizon Wireless’ suggestion,²⁷ therefore, there are specific statutory provisions that support imposition of the Commission’s ancillary authority. As the Commission itself has recognized, and consistent with applicable judicial authority, the Commission has ancillary jurisdiction under Title I to enforce automatic roaming obligations relative to non-interconnected data services that are classified for other purposes as information services.

²⁴ Section 254(b)(3), 47 U.S.C. § 254(b)(3).

²⁵ Comments of the Rural Telecommunications Group, Inc. and the Organization for the Promotion and Advancement of Small Telecommunications Companies, filed October 29, 2007, at 5.

²⁶ *Wireless Broadband Internet Access Order*, ¶ 70.

²⁷ Verizon Wireless Comments, at 6.

II. APPLICATION OF AUTOMATIC ROAMING OBLIGATIONS TO BROADBAND INTERNET ACCESS SERVICES WILL NOT REDUCE INCENTIVE TO DEPLOY INFRASTRUCTURE

In addition to arguing that the Commission lacks legal authority to extend automatic roaming requirements to non-interconnected data services, Verizon Wireless argues that such a requirement would serve to “chill” investment by host carriers in new technologies.²⁸ It is hard to imagine that Verizon Wireless would stop trying to differentiate itself competitively through the development of new technologies if it believed that the customers of smaller operators would be allowed to roam on its network. Under no circumstances has any party proposed in this proceeding that CMRS host operators not be permitted to continue to negotiate special, even exclusive, arrangements with product manufacturers and content suppliers for their customers.

What requires more urgent attention and understanding, however, is the fact that the Commission’s decision regarding the scope of automatic roaming obligations is likely to impact the survivability of smaller, particularly rural, carriers as competitive entities in a market in which access to broadband data services is becoming a matter of customer expectation, not aspiration.²⁹ As the representatives of small and rural carriers have eloquently argued in the initial comment round in this proceeding, the absence of access to meaningful non-interconnected, broadband roaming rights on reasonable terms is resulting in smaller wireless carriers becoming undervalued by their customers. As a result, the lack of such access creates a disincentive for smaller carriers to continue to invest in and upgrade their own networks, and thereby remain viable competitors.³⁰

²⁸ See *Report and Order*, ¶ 79; Verizon Wireless Comments, at 8-9.

²⁹ See Comments of Rural Cellular Ass’n, filed October 29, 2007, at 2.

³⁰ See RTG and OPASTCO Comments, at 6; Rural Cellular Ass’n Comments, at 4.

MTA Wireless is willing to accept reasonable conditions to qualify for roaming access to non-interconnected, broadband data services, such as having to offer such services on the roaming carrier's own network within its coverage area.³¹ But it rejects any suggestion that granting such roaming rights, on just and non-discriminatory terms, would serve as a disincentive to infrastructure deployment on the part of either the host or the roaming carrier. Instead, it strongly concurs that the denial of such essential roaming rights in the current market will undermine the viability of smaller competitors, and will help lead to their elimination, thereby further reducing competitive choices for consumers.

III. THE COMMISSION SHOULD GRANT THE PETITIONS FOR RECONSIDERATION OF THE "HOME MARKET" EXCEPTION

MTA Wireless believes there is merit in the several petitions for reconsideration filed in this proceeding requesting that the Commission rescind or otherwise amend its decision that the automatic roaming requirement does not include an "in-market" or "home roaming" requirement.³² The Commission concluded in its *Report and Order* that an automatic roaming request for service in an area where the requesting CMRS carrier has the spectrum to compete directly with the target host carrier would not serve the public interest as it neither encourages facilities-based competition nor supports consumer expectation of seamless coverage when traveling outside the home area. Applying this philosophy, the Commission then concluded that a CMRS operator is not required to provide automatic roaming in areas where the requesting carrier holds a

³¹ See *Report and Order*, ¶ 79.

³² *Id.*, ¶¶ 48-50.

wireless license or contractual spectrum usage rights with which to provide competitive service.³³

As pointed out by the petitioning parties, however, the Commission's proposed solution to the perceived policy problems is overly broad in that it will work to nullify the automatic roaming obligation in markets in which the requesting carrier has secured spectrum through competitive bidding or contract, but where the spectrum is not presently usable to provide facilities-based competition. This is certainly the case with the advanced wireless service ("AWS") spectrum on which MTA Wireless successfully bid for a state-wide license covering the entire Alaska market. Because access to that spectrum for the provision of services remains at this time dependent on (i) relocating incumbent, government users to other spectrum, and (ii) the availability of equipment at affordable rates, MTA Wireless and other AWS license awardees do not expect to be able to compete by means of this spectrum for a minimum period of two more years. Thus, enforcement of the "home market" exception would end up effectively vitiating the Commission's grant of automatic roaming rights as far as MTA Wireless is concerned for the next two years, and would penalize MTA Wireless for having taken the initiative of securing spectrum with which eventually to provide facilities-based competition.

To cure this adverse result, MTA Wireless does not believe that the "home market" exception needs to be rescinded in its entirety, but rather that it be interpreted by the Commission to apply only in circumstances in which the requesting carrier is actually providing competitive wireless services using its own licensed or leased spectrum. Thus, MTA Wireless endorses T-Mobile's proposal that the definition of "home market" in Section 20.3 of the Commission's Rules, 47 C.F.R. § 20.3, be amended to refer to the

³³ *Id.*, ¶ 48.

geographic location in which a CRMS carrier has an *operating* network in place that can be used to provide CMRS services.³⁴ To permit established CMRS operators to refuse to grant automatic roaming rights where the requesting carrier is not yet capable of providing competitive services using its own facilities would have the unintended adverse consequence of discouraging the growth of competitive facilities-based services and of reinforcing the entrenched positions of large, incumbent providers.

CONCLUSION

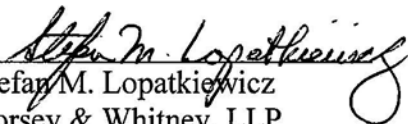
As set forth above, the Commission has ample legal authority under both Title II and Title I of the Act to extend the application of its automatic roaming rule to non-interconnected, broadband services. Extension of the rule in this manner will encourage investment in smaller CMRS networks and spur their acquisition and development of innovative technologies and service offerings for the benefit of their end users. Finally, the “home market” exception to the Commission’s imposition of automatic roaming requirements should be circumscribed and tailored to apply only to those circumstances in which the requesting carrier actually has an operational system in a geographic area

³⁴ Petition for Partial Reconsideration of T-Mobile USA, Inc., filed October 1, 2007, at 1-2.

overlapping with that of the target host carrier, so that it does not give rise to the unintended, adverse consequence of discouraging the growth of new facilities-based competitors.

Respectfully submitted

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